Re Andrew Hilary Caldecott QC

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2-17-12 OF 1998
AZMEL J
13 JULY 1998

Legal Profession *— Admission — Ad hoc — Queen's Counsel — Whether applicant could be exempted from undergoing the prescribed period of pupilage and passing the Bahasa Malaysia Qualifying Examination — Whether applicant has special qualifications not available amongst advocates and solicitors in Malaysia — Legal Profession Act 1976 ss 18 & 11*

This was an application to admit Andrew Hilary Caldecott QC as an advocate and solicitor of the High Court of Malaya under s 18 of the Legal Profession Act 1976 ('the Act'). Counsel for the applicant submitted that s 18 of the Act must be construed purposively and not literally, and as such it should be read on its own without any reference to s 11 of the Act. Counsel further added that any reference made to s 11 would mean the need for the applicant to undergo the prescribed period of pupilage and to pass the Bahasa Malaysia Qualifying Examination.

An affidavit in support of this application made by one Rabindra S Nathan stated that the application was made to enable the applicant to act as the leading counsel on behalf of Messrs Skrine & Co in five legal suits in the High Court of Malaya. According to the affidavit, the applicant, being a specialist in the field of defamation law and related areas of breach of confidence and contempt of court, would be able to deal with the difficult and complex issues which would arise in the suits. The senior federal counsel, in opposing the application, submitted that the actions involved in this application were not so complex that local advocates and solicitors could not handle them. He also highlighted that the same issues had been dealt with recently by another High Court in which the application was dismissed. He then urged the court to do the same.

Held, dismissing the application:

(1) Having regard to the present wording of s 18(1), it was necessary to refer to s 11 of the Act on the issue of eligibility for admission. To do otherwise would be acting contrary to the intention of the legislature. In this case, the applicant had failed to comply with the conditions contained in s 11 of the Act. While the requirement for pupilage in s 11(1)(d) could have been waived had a proper application been made, the Bahasa Malaysia requirement in s 11(2) could not and should not be waived (see p 723D–F).

(2) Section 18(1) only allowed an application for the purpose of any one case. But this application was in respect of five cases. Clearly this application was not in conformity with the provision as stipulated in s 18(1) of the Act (see p 725D).

(3) The court was unable to find any mention in the supporting affidavit that the applicant was a specialist in the four so-called areas of law relating to the difficult and complex issues. The burden was on the applicant to show to the satisfaction of the court that he had such special qualification or experience of a nature not available amongst advocates and solicitors in Malaysia. Not only had the applicant failed to prove as such, the applicant himself had also not proved to the satisfaction of the court that he was a specialist in the law covering the complex issues (see p 725G–I).

[Bahasa Malaysia summary

Ini merupakan satu permohonan untuk menerima masuk Andrew Hilary Caldecott QC sebagai seorang peguambela dan peguamcara Mahkamah Tinggi Malaya di bawah s 18 Akta Profesyen Undang-Undang 1976 ('Akta tersebut'). Peguam pemohon telah berhujah bahawa s 18 Akta tersebut seharusnya ditafsirkan dengan maksud tertentu dan bukannya secara harfiah, dan oleh yang demikian ia haruslah dibaca dengan sendirinya tanpa sebarang rujukan kepada s 11 Akta tersebut. Peguam selanjutnya menambah bahawa sebarang rujukan yang dibuat kepada s 11 akan bermakna pemohon perlu menjalani tempoh latihan guaman yang ditetapkan dan lulus Peperiksaan Kelayakan Bahasa Malaysia.

Satu afidavit bagi menyokong permohonan ini yang dibuat oleh seorang bernama Rabindra S Nathan menyatakan bahawa permohonan tersebut telah dibuat bagi membolehkan pemohon bertindak sebagai peguam utama bagi pihak Tetuan Skrine & Co dalam lima guaman undang-undang di Mahkamah Tinggi Malaya. Menurut afidavit tersebut, pemohon, yang merupakan seorang pakar dalam bidang undang-undang fitnah dan bidang yang berkaitan dengan kemungkiran keyakinan dan penghinaan mahkamah, akan dapat menguruskan isu-isu yang sukar dan rumit yang akan berbangkit dalam guaman-guaman tersebut. Peguam kanan persekutuan, dalam membantah permohonan tersebut, berhujah bahawa tindakan-tindakan yang terlibat dalam permohonan ini tidak sebegitu rumit hinggakan peguamcara dan peguambela tempatan tidak dapat mengendalikannya. Beliau telah juga menyerlahkan bahawa isu-isu yang sama telah diuruskan baru-baru ini oleh sebuah Mahkamah Tinggi yang lain di mana permohonan telah ditolak. Beliau kemudiannya telah menggesa mahkamah supaya melakukan yang sedemikian.

Diputuskan, menolak permohonan:

(1) Dalam mempertimbangkan susunan kata s 18(1), adalah perlu untuk merujuk kepada s 11 Akta tersebut mengenai isu kelayakan untuk kemasukan. Untuk melakukan sebaliknya adalah bertindak bertentangan dengan niat perundangan. Dalam kes ini, pemohon

telah gagal mematuhi syarat-syarat yang terkandung dalam s 11 Akta tersebut. Sementara syarat untuk tempoh latihan guaman dalam s 11(1)(d) mungkin dapat diketepikan sekiranya satu permohonan yang teratur dibuat, keperluan Bahasa Malaysia dalam s 11(2) tidak dapat dan tidak seharusnya diketepikan (lihat ms 723D–F).

(2) Seksyen 18(1) hanya membenarkan sesuatu permohonan bagi tujuan mana-mana satu kes. Tetapi permohonan ini adalah berhubung dengan lima kes. Jelasnya permohonan ini tidak mematuhi peruntukan sepertimana yang ditetapkan dalam s 18(1) Akta tersebut (lihat ms 725D).

(3) Mahkamah tidak dapat menemui sebarang sebutan dalam afidavit yang menyokong bahawa pemohon merupakan seorang pakar dalam keempat-empat bidang undang-undang yang berkaitan dengan isu-isu yang sukar dan rumit. Beban terletak pada pemohon bagi menunjukkan demi kepuasan mahkamah bahawa beliau mempunyai kelayakan serta pengalaman istimewa sedemikian yang tidak terdapat di kalangan peguamcara dan peguambela di Malaysia. Pemohon bukan sahaja telah gagal untuk membuktikan sedemikian, beliau telah juga tidak membuktikan demi kepuasan mahkamah bahawa ia adalah seorang pakar dalam undang-undang yang meliputi isu-isu rumit tersebut (lihat ms 725G–I).]

Notes

For cases on ad hoc admission as advocate and solicitor, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1345–1363.

Legislation referred to

Legal Profession Act 1976 ss 11(1)(a), (b), (c), (d), (2), 18(1)(a)

Robert Lazar (*G Rajasingam* with him) (*Shearn Delamore & Co*) for the applicant, the second defendant and K Anantham.

Zulkifli Bakar (Senior Federal Counsel) for the Attorney General.

P Paramjothy (*Chan Moosdeen & Partners*) for the Bar Council and the Kuala Lumpur Bar Committee.

Raja Aileen (*Lee Hishammudin*) for Tommy Thomas.

R Thayalan (*V Siva & Partners*) for the plaintiffs.

Azmel J: There are two main issues that have been raised during the hearing of this application to admit En Andrew Hilary Caldecott QC, as an advocate and solicitor of the High Court of Malaya under s 18 of the Legal Profession Act 1976 ('the Act'). They are as follows:

(1) a proper interpretation of s 18(1) of the Act in that in the light of the presence of the words 'would be eligible to be admitted as an Advocate

A and Solicitor of the High Court' whether s 18 should be read together with s 11 of the Act; and

(2) on the merits of the application, whether the requirements under s 18(1)(a) of the Act have been satisfied.

B In respect of the first issue, I have heard the submission of En Robert Lazar, counsel for the applicant, to which the other counsel including En Zulkifli Bakar, Senior Federal Counsel, appearing on behalf of the Honourable Attorney General, have agreed. It was the submission of En Robert Lazar that s 18 of the Act must be construed with a purposive approach and not the literal approach, and as such, it should be read by C itself without reference to any other provisions of the Act. Therefore, s 11 should not be referred to, otherwise it would become ridiculous because this would mean the need for the applicant QC to undergo the prescribed period of pupilage under s 11(1)(d) of the Act. In addition to that, s 11(2) requires the applicant QC to pass the Bahasa Malaysia Qualifying Examination.

D Encik Robert Lazar also informed the court that s 18(1) was amended by Parliament at the same time when s 11(2), the requirement to pass Bahasa Malaysia Qualifying Examination, was added in. The wording of the main clause to s 18(1) before the amendment was distinctively different from the wording of the present clause, in that under the E present clause the words 'any person who, if he was a citizen of, or permanent resident in Malaysia, would be eligible to be admitted as an Advocate and Solicitor' had been added in. These amendments came into force in 1984. As I intend to discuss the present and the previous s 18(1) of the Act, it is therefore appropriate for me to state their F wordings. They are as follows:

Prior to amendment:

> Notwithstanding anything to the contrary contained in this Act, the Court may, in its sole discretion for the purpose of any one or more specific causes or matters, admit to appear as counsel any person:
>
> G (a) who holds Her Britannic Majesty's Patent as Queen's Counsel or has special qualifications or experience for the purpose of such cause or matter or has been in active practice as an advocate and solicitor in Singapore for not less than seven years immediately preceding the filing of the application for admission;
>
> (b) who does not ordinarily reside in Malaysia but who has come or H intends to come to West Malaysia for the purpose of appearing in such causes or matters; and
>
> (c) who is or will if admitted be instructed by an advocate and solicitor.

After the amendment:

> I Notwithstanding anything contained in this Act, the Court may, for the purpose of any one case and subject to the following subsections, admit to practise as an advocate and solicitor any person who, if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an

advocate and solicitor of the High Court and no person shall be admitted to practise as an advocate and solicitor under this subsection unless: A

(a) for the purpose of that particular case he has, in the opinion of the Court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and

(b) he has been instructed by an advocate and solicitor in Malaysia. B

After having heard the submission of En Robert Lazar on this issue, strongly urging the court to adopt the purposive approach of interpretation and after having examined the wordings of s 18(1) before and after the amendment, I do find that the present content of s 18(1) is not similar to what it was before the amendment. There must be a good reason for the material change in the wording. It is therefore essential that I look into the intention for making the amendment to s 18(1) of the Act. In my view, the opening words of s 18(1), 'Notwithstanding anything contained in this Act' would conclusively exclude reference to any other provisions of the Act if the present s 18(1) is worded similar to the pre-amendment wording. But after the amendment, with the inclusion of the additional words that I have just mentioned, especially the words 'would be eligible', it would be quite inappropriate for me to conclude that the position is the same as it was before the amendment. The amendment to s 18(1) must be for a specific purpose. This view is supported by the fact that s 18(1) was amended at the same time when s 11(2) was added in. This is a policy of the government to ensure the maximization of the utilization of Bahasa Malaysia in court. I am of the view that in making the amendment to s 18(1), the draftsmen must have also had in mind the inclusion of s 11(2) of the Act. I believe it was for that reason that s 18(1) had been differently worded, the need to refer to eligibility for admission. In addition to this, there are other changes to the content of s 18(1) which I shall state later. C D E F

In his submission, En Robert Lazar strongly suggested to the court that to invoke s 11 in interpreting s 18 would be very ridiculous because it would become absurd to ask the applicant QC, an eminent barrister, to undergo a certain period of pupilage again before admission.

Before I comment on this submission, let me quickly refer to the provisions of s 11 of the Act. It deals with eligibility of a qualified person to be admitted as an advocate and solicitor. As I have said earlier, s 11(2) deals with the requirement to pass the Bahasa Malaysia Qualifying Examination. Section 11(1) stipulates four conditions of eligibility. Conditions (a) and (b), which deal with minimum age and good character, have been fully satisfied by the applicant QC. Condition (c), which talks of the need to be a citizen of or permanent resident in Malaysia is unequivocally waived by s 18(1). That leaves out condition (d), the need to undergo period of pupilage. En Robert Lazar quite strongly suggested it would be ridiculous to impose such condition for admitting the applicant QC who is eminently qualified and experienced. He also informed the court that the Bar Council can only waive a period of three months of a total of nine months prescribed period of pupilage. G H I

After having considered En Robert Lazar's submission, I held the view that this condition is waivable. Of course, I would fully agree that it would

A be ridiculous to insist on the applicant QC to undergo any further period of chambering. He has more than the necessary practical experience that one would expect from a newly qualified person. Even a person who has served in the judicial and legal service for a period of seven years can be given total exemption from doing chambering by the Attorney General. And in the case of this applicant QC, such waiver may also be applied for. On a proper application being made, this court may exercise its inherent jurisdiction to waive whatever remaining period of pupilage the applicant QC, which the Bar Council is unable to grant, if such application is met with the concurrence of all parties concerned, and I do not see any reason why any party should object. However, there is no evidence that such application has been made in any of the courts here. And in fact there is no evidence before me that the applicant QC, has applied to the Bar Council for any reduction of period of his pupilage. Had there been such application, I am quite confident that condition (d) of s 11(1) of the Act can be waived. Hence, the requirements under s 11(1) are capable of being complied with by the applicant without the need to do any more chambering.

But the requirement under s 11(2) of the Act cannot and should be treated in the same manner. This is a policy of the government to effect maximum usage of Bahasa Malaysia in the courts. In order to be admitted as an advocate and solicitor of the High Court of Malaya as of 1 January 1984, an applicant, permanent or otherwise, must have passed his Bahasa Malaysia Qualifying Examination.

In the circumstances, I am unable to agree with En Robert Lazar's submission as to the manner s 18(1) of the Act be interpreted. In my view, having regard to the present wordings of s 18(1), it is also necessary to refer to s 11 of the Act, on the issue of eligibility of admission. To do otherwise would be acting contrary to the intention of the legislature. With the reasons stated above, I find that the applicant has failed to comply with conditions as contained in s 11 of the Act and on this ground alone, this application should be dismissed.

Be that as it may, I also proceeded to consider the merits of this application which is the second issue that I now propose to consider. The affidavit in support of this application is made by En Rabindra S Nathan, an advocate and solicitor, and a partner of M/s Shearn Delamore & Co. It is to be noted that this application is objected to by the Honourable Attorney General of Malaysia.

According to the affidavit of En Rabindra S Nathan, the application to admit the applicant QC, was made to enable him to act as the leading counsel on behalf of the second defendant, Tetuan Skrine & Co, in five legal suits in the High Court of Malaya, namely:

(1) High Court of Malaya at Kuala Lumpur (Civil Division) Suit No S2–23–52–96;

(2) High Court of Malaya at Kuala Lumpur (Civil Division) Suit No S4–23–19–96;

(3) High Court of Malaya at Kuala Lumpur (Civil Division) Suit No S4–23–39–96;

(4) High Court of Malaya at Kuala Lumpur (Civil Division) Suit No S3–23–44–96; and

(5) High Court of Malaya at Kuala Lumpur (Civil Division) Suit No S3–23–43–96.

The second defendant are the partners of Tetuan Skrine & Co and En Tommy Thomas, who is also a partner of the second defendant, is the first defendant in respect of the first four cases stated above. In the fifth case, S3–23–43–96, the first defendant is En Anantham, who is also a partner of the second defendant. Each of the five actions arose from certain alleged defamatory statements made by the first defendant in a certain article in an overseas magazine published sometime in November 1995. The actions against the second defendant are for the alleged acts of the first defendant, who is, as the case may be, a partner of the second defendant, and as such the second defendant are allegedly vicariously liable.

According to the affidavit of En Rabindra S Nathan, among the issues that will arise at the hearings are:

(1) the issue of vicarious liability which is not straightforward at all;

(2) the liability of partners who joined after publication;

(3) the correct legal approach to exemplary damages against the partnership where serious allegations of bad faith are pleaded; and

(4) the issue of proper approach to the quantum of compensation if any, payable to corporate plaintiffs.

He claims that these are difficult and complex issues.

In paras 10 to 13 of his affidavit, En Rabindra S Nathan states the qualification and experience of En Andrew Hilary Caldecott QC, showing that the applicant is an eminent and well qualified barrister at the English Bar. He is a member of a specialist chamber in London in the field of defamation law and related areas of breach of confidence and contempt of court. He has also written a book dealing with libel, slander and malicious falsehood. In addition to that, he has also appeared in a number of leading decisions in the United Kingdom, involving defamation law and related areas of breach of confidence and contempt of court.

The senior federal counsel in opposing the application, submitted that there are a number of defamation cases heard in Malaysia and conducted by local advocates and solicitors. The actions involved in this application are not so complex that local advocates and solicitors cannot handle them. The learned senior federal counsel also informed the court that the same issues have been dealt with recently by another High Court in Kuala Lumpur (Usul Pemula No R2–17–8–98); in which the application has been dismissed. He then urged this court to also dismiss this application.

It may be pertinent, at this juncture, for me to state that I also notice certain other differences between the previous and present wording of s 18(1), apart from the difference in the wording that I have earlier mentioned. They are as follows:

(1) In the pre-amendment clause, the words 'in its sole discretion' appeared after the words 'the Court may.' Those words do not appear in the post-amendment clause.

(2) In the pre-amendment clause, the application can be made for 'any one or more specific causes or matters.' But in the post-amendment clause, the application is 'for the purpose of any one case.'

In the light of such amendments to the wording of the present s 18(1) of the Act, I am of the view that the discretion to be exercised by the court in considering such application is not an unfettered one and also s 18(1) does no longer allow any application in respect of more than one case.

After having considered carefully the materials before me including the submissions of all counsel at the hearing, I arrive at the conclusion that this is not a proper case for me to allow the application. My grounds are as follows:

(1) Section 18(1) only allows an application for the purpose of any one case. But this application is in respect of five cases. Clearly this application is not in conformity with the provision as stipulated in s 18(1) of the Act. On this ground alone the application can be dismissed.

(2) As stated in the supporting affidavit, the applicant QC is eminently and highly qualified as specialist in the field of defamation law and related areas of breach of confidence and contempt of court. Also he has written a book dealing with libel, slander and malicious falsehood. But in the same supporting affidavit, the areas of law claimed to be complex issues are:

(i) vicarious liability;

(ii) liabilities of partners who joined after publication;

(iii) correct legal approach to exemplary damages against the partnership; and

(iv) proper approach to quantum of compensation payable to corporate partners.

After having read the supporting affidavit quite thoroughly, I am unable to find any mention in it that the applicant QC is a specialist in the four so-called areas of law relating to the difficult and complex issues. In my view, these are general laws not peculiar only to cases of defamation libel, slander and malicious falsehood. The burden is on the applicant to show to the satisfaction of the court that he has such special qualification or experience of a nature not available amongst advocates and solicitors in Malaysia. Not only had the applicant failed to prove that the local advocates and solicitors do not have such knowledge but the applicant himself has also not proved to the satisfaction of this court that he is a specialist in the law covering the four complex issues. On this ground, I would completely agree with the submission of the learned Senior Federal Counsel that there are local advocates and solicitors who had been involved in cases of defamatory claims.

(3) I have read the decision of Nik Hashim J in the case of Usul Pemula No R2–17–8–98 involving similar issues. I do not find any reason to disagree with his decision and grounds on which he arrived at his decision in dismissing the application.

(4) In addition to the above, I have also taken into consideration the following matters, namely:

(i) the government had quite some time ago, done away with appeals to Privy Council as the government felt that the Federal Court of Malaysia have the capability and ability to decide all cases in Malaysia without any more need to refer to the courts in the United Kingdom;

(ii) the Malaysian Bar after attaining 50 years of age, with members of no fewer than 7,000, should no longer be regarded as still in its infanthood. It would be contrary to the interest of the Malaysian Bar to easily admit that none of them at all is capable of handling the cases involved in this application; and

(iii) the current economic recession has caused the government to discourage the import of foreign products, but to encourage the use of local products. Therefore, it would be contrary to public policy to allow a foreign barrister who will likely be earning quite substantial legal fees, to handle local cases when local advocates and solicitors are available and capable. Any act that would result in the outflow of money from Malaysia should be totally discouraged as this would be contrary to national interest.

In the circumstances and for the reasons that I have stated above, I dismiss this application with costs.

Application dismissed with costs.

Reported by Mohd Rizal Abidin